

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY
(AMERITECH ILLINOIS) and
CORDIA COMMUNICATIONS CORP.

)

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DOCKET No. 02-0650

Joint Petition for Approval of Negotiated
Interconnection Agreement dated August 29,
2002 pursuant to 47 U.S.C. § 252

)

REPLY TO BRIEFS ON EXCEPTIONS

December 2, 2002

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TABLE OF CONTENTS

1.	Section 252(e) Does not Place the Burden of Proof on the State Commission	1
2.	Protecting State Service Quality Standards Are Not Contradictory to Federal Law 2	
3.	The Underlying Question of the Remedy Plan Review, as Posed By Ameritech, is Inconsistent with Federal Law	5
4.	The Burden Upon the State Commission is not a "Heavy One"; Section 10-15 of the Illinois APA Controls the Determination of the Burden of Proof in this Situation	6
5.	Section 10.6 of the SBC11STATE plan Defeats the Purpose of Tier 1 Payments Acting as Liquidated Damages	9
6.	Tier 2 Payments need to Be Clearly Stated in the Remedy Plan in the Interconnection Agreement	11
7.	The SBC11STATE plan is not the FCC's Plan	11
8.	Absence of Provisions in the SBC11STATE plan That Are Clearly Provided for in the Illinois Remedy Plan Are Not in the Public Interest.....	13
9.	The Proposed Order's Interpretation of Section 6.1 is Entirely Reasonable	14
10.	The Commission Properly Assigned a Negative Inference to Ameritech's Refusal to Produce Evidence Regarding Tier 1 Payments	14
11.	The Commission Has Already Concluded the Need for an adequate Performance Measurement and Remedy Plan (Ameritech BOE §V.A)	15
12.	Negotiations Go to Both the Facts of Agreement and the Measurement of the Public Interest (Ameritech BOE §V.B)	16
13.	The Proposed Rejection of This Agreement Cannot Be Held to be Unlawful under 47 USC 252 (e) (3) (Ameritech BOE §V.C.)	18
14.	The Finding Concerning the Prior Dockets Should Remain (Ameritech BOE § V.D.)	19
15.	The Public Is Not Convenienced by Silence on the CLEC Waiver Issue (Ameritech BOE §V.E.).....	19

Now come the Staff of the Illinois Commerce Commission by their attorneys, James E. Weging, Sean R. Brady, and Matthew L. Harvey, and file this Reply to Briefs on Exceptions in the above docket.

Staff agrees with the Proposed Order on the whole, and asserts that the Proposed Order remain unchanged, with exceptions as noted in its Brief on Exceptions.

1. Section 252(e) Does not Place the Burden of Proof on the State Commission

Ameritech interprets Section 252(e) as placing the burden of proof upon Staff based on its content and language (AI BOE at 5-7), however, Section 252(e) does not expressly state that the burden has shifted, or has been placed upon the state commission. As the Proposed Order correctly found, Section 252(e) creates a presumption in favor of interconnection agreements, and that a presumption shifts the burden of going forward, but does not relieve the burden of proof from the proponent (in the instant case, the proponent of the Ameritech/Cordia interconnection agreement). Proposed Order at 16-17.

Additionally, Ameritech is arguing a series of presumptions based on its interpretation of Section 252(e). AI BOE at 5-6 (arguing presumptions based on its interpretation of Sections 252(e)(1), (e)(2) and (e)(4)). In the absence of federal law expressly stating the procedure to be applied state law is to be followed. Indeed, the Illinois Supreme Court has gone so far as to state ‘courts have **uniformly** imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof.’” Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082 (1981) (emphasis added). Since Section 252 does not expressly

place the burden upon the state commission, but only presents a presumption for negotiation of interconnection agreements, state law controls; the Illinois Supreme Court clearly states that petitioner bears the burden.

Ameritech argues that the party “who claims the benefits of an exception to the prohibition of a statute” has the burden of proof. AI BOE at 6. Even if the Commission finds this to be the case, Staff would have met that burden in this case. Staff has compared the SBC11STATE plan to the Illinois Remedy Plan, it has identified those sections that are not consistent between the two plans, and are worse than the comparable provisions in the Illinois Remedy Plan. Therefore it is clear that the SBC11STATE plan is not in the public interest. Staff has complied with the requirements of Section 252(e) in making its case. See supra §4 (outlining the requirements of Sections 252(e)).

2. Protecting State Service Quality Standards Are Not Contradictory to Federal Law

Ameritech argues that rejecting the Agreement “flies in the face of one of the bedrock requirements of the 1996 Act; that carriers be permitted to arrive at interconnection agreements on their own if possible, without the aid of arbitration.” AI BOE at 28-29. Ameritech is wrong since the “bedrock requirement” Ameritech cites supports the goal of TA96, which is to increase competition in the telecommunications market. In increasing competition TA96 also grants states the ability to protect its public, and that is traditionally accomplished by setting service quality standards that are protected by a remedy plan, as acknowledged by §252(e)(3) (47 U.S.C. §252(e)(3)) the FCC approval of the SBC/Ameritech merger (FCC Merger Order, FCC 99-279, CC

Docket #98-141, Appendix C, Condition 23 (Stating “the Plan does not limit the authority of any state to adopt additional or different state performance monitoring requirements or associated remedies.”)), and every Section 271 approval by the FCC. See, New York 271 Order, ¶429. Texas 271 Order ¶420, Kansas/Oklahoma 271 Order ¶269, Massachusetts 271 Order ¶¶236-37, Connecticut 271 Order ¶76, Pennsylvania 271 Order ¶127, and Arkansas/Missouri 271 Order ¶127¹, stating that “performance monitoring and enforcement mechanisms . . . , in combination with other market factors, provide strong assurance that the local market will remain open after [RBOC] receives section 271 authorization”).

It is undeniable that Ameritech and Cordia have been allowed to negotiate an interconnection agreement, however federal law, through section 252(e)(3), allows the state commission to protect its public and service quality standards. See 252(e)(3). Federal law also allows state commissions the ability to protect the public interest by enforcing state laws and orders (such as Docket 01-0120) that are not contradictory to the requirements of TA96; that is the hurdle that the Ameritech/Cordia agreement fails to overcome.

In Docket 01-0120, the Commission has approved and set forth a remedy plan that applies to Ameritech wholesale service quality with the goal of ensuring a competitive environment in Illinois. Order, Docket 01-0120 at **4, 11-12** (“Remedy Plan Order”); Merger Order² at §1.2.h at 217. The *Remedy Plan Order* evaluated the Texas

¹ Full cites provided in Attachment A.

² Joint Application for approval of the reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of the PUA and for all other appropriate relief, Docket 98-0555 (dated Sept.23, 1999) (hereafter “Merger Order”)

Remedy Plan and considered Ameritech's performance in the Fall of 2000³, and after considering these factors the Commission approved a remedy plan (hereafter "Illinois Remedy Plan") that incorporates a specific list of wholesale performance measures (hereafter "PMs"), has a level of potential liabilities to ensure that Ameritech meets the PMs standards, has a system of annual and mini-audits, an annual "soft" cap on overall payments, has a procedural trigger for a regulatory proceeding that investigates the reasons for poor performance, and allows a CLEC to pursue other forms of remedies. *Remedy Plan Order* at 13-16, 23-25, 27-30, 31, 35-38, 41-44. The *Remedy Plan Order* is like most other orders issued by an administrative agency, it acts as a floor for performance; requiring a carrier to act, or provide service, above that stated in the order. The Commission specifically made changes to improve the Texas Remedy Plan's effectiveness so that competition in Illinois' wholesale marketplace will grow. Merger Order, §I.2.i at 217 (stating that the Texas Plan "falls short of what we consider necessary to safeguard our ability to monitor a thriving and dynamic competitive telecommunications market for consumers.") To the extent that the Illinois Remedy Plan is intended to improve competition in the marketplace, it therefore furthers TA96, not contradicts it, since the whole purpose of TA96 is to open the market to competition.

³ In effect, the *Remedy Plan Order* also took into account the impact the SBC11STATE plan had on Ameritech's performance, since Ameritech claims the SBC11STATE plan was in interconnection agreements as long as two years ago, and Docket 01-0120 analyzed Ameritech's performance in the Fall of 2000 in determining what changes to make to the Texas Remedy Plan.

3. The Underlying Question of the Remedy Plan Review, as Posed By Ameritech, is Inconsistent with Federal Law

On page 3 Ameritech states, “here, the question is not what is the best possible plan. It is whether the plan in the Agreement falls so far short that its implementation is inconsistent with the public interest.” And similarly, on pages 23-24 Ameritech contends that Staff needs to show “that the 11-state plan⁴ is less stringent than the 01-0120 Plan [Illinois Remedy Plan], to such a degree that the quality of Ameritech Illinois’ wholesale service will decline if the Agreements are approved.” Not surprisingly, Ameritech provides no legal citation in support of these questions -- there is none. The question before us, and which the Proposed Order correctly determines (at 19), is found by looking at Section 252(e)(1) and (e)(3). In reviewing Sections 252(e)(1) and 252(e)(2)(ii), an interconnection agreement may be rejected by the Commission if it finds that “such agreement or portion is not consistent with the public interest” (252(e)(2)(ii)), and if the Commission is to reject an agreement to provide “written findings as to any deficiencies”, (252(e)(1)). The public interest is what the Commission has ordered on wholesale remedy plans -- the Illinois Remedy Plan. Staff IB at 10; infra §2. Therefore, the question is whether the SBC11STATE plan is not consistent with the public’s interest -- the Illinois Remedy Plan.

Moreover, Staff has compared the SBC11STATE plan to the Illinois Remedy Plan, it has identified those sections that are not consistent between the two plans, and are worse than the comparable provisions in the Illinois Remedy Plan. Therefore it is clear that the SBC11STATE plan is not in the public interest. Staff has complied with the requirements of Section 252(e) in making its case.

4. The Burden Upon the State Commission is not a "Heavy One"; Section 10-15 of the Illinois APA Controls the Determination of the Burden of Proof in this Situation

Ameritech argues that the standard of proof should be the same as is used by criminal courts for cases of fraud -- "clear and convincing." The Proposed Order correctly determined that the standard of proof that Ameritech must meet is "preponderance of the evidence." Proposed Order at 17-18.

Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. The Commission has observed that the Administrative Procedure Act standard appears to be "the appropriate standard in all contested cases[.]" *Order* at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200, ICC Docket No. 92-0024 (April 29, 1992)⁵. Consequently, the standard of proof in this case is the preponderance of the evidence standard.

It cannot be credibly argued that any other standard applies, for the following reasons.

The standard of proof applicable to a particular type of adjudication must balance the private interest implicated with the governmental interest, and the permanency of the loss threatened by the government action. Feliciano v. Illinois Racing Board, 110 Ill.

⁴ Also referred to as "SBC11STATE plan."

App. 3d 997, 1000; 443 N.E.2d 261 (1st Dist. 1982). The primary factor in determining the standard of proof in an administrative proceeding is the interest that will be affected by the administrative decision, viewed in the light of competing societal interests, rather than the conduct which forms the basis for the administrative action sought. Sutton v. Edgar, 147 Ill. App. 3d 723, 730; 498 N.E.2d 295; 101 Ill. Dec. 113 (4th Dist. 1986). The protection of purely economic interests does not require a standard of proof as demanding as the protection of more fundamental rights, such as the individual liberty of parental rights. Feliciano, 110 Ill. App. 3d at 1002.

It is worthy of note, that in Illinois administrative proceedings, preponderance of the evidence is the standard, even in proceedings where both civil and criminal penalties could attach; clear and convincing evidence is almost never required. St. Charles Bd. of Education v. Adelman, 97 Ill. App. 3d 530, 532, 423 N.E.2d 254 (2nd Dist. 1981). Indeed, the U.S. Supreme Court tends to require application of the “clear and convincing” standard only where a significant interest – generally a life or liberty interest, as opposed to a property interest-- is implicated. See, e.g., Cruzan, by Cruzan et ux. v. Director, Missouri Department of Health, et al. 497 U.S. 261; 110 S. Ct. 2841; 111 L. Ed. 2d 224 (1990) (discontinuance of nutrition and hydration of a person diagnosed to be in a persistent vegetative state); Santosky v. Kramer, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (termination of parental rights); Addington v. Texas, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) (involuntary civil commitment); Woodby v. Immigration & Naturalization Service, 385 U.S. 276, 17 L. Ed. 2d 362, 87 S.

⁵ It is worthy of note that the Chicago Bar Association, which rarely participates in Commission proceedings, filed comments in Docket No. 92-0024 supporting the preponderance standard. Order at 1-2.

Ct. 482 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 5 L. Ed. 2d 120, 81 S. Ct. 147 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943) (denaturalization). These cases, of course, deal with the loss of one's life, child, citizenship, right to continue to reside in the United States, or freedom to leave a mental hospital. It is hard to characterize contract rights arising under a negotiated interconnection agreement as implicating any such interest.

Moreover, as is readily apparent, all of the above-noted rights – life, custody of children, citizenship, residency, personal freedom – to which the “clear and convincing” standard applies, are rights enjoyed by natural persons. Illinois Bell Telephone (hereafter “Ameritech”), Royal Phone Company LLC, (hereafter “Royal”) and Easton Telecom Services LLC (hereafter “Easton”) are, hopefully needless to say, not natural persons, but in fact corporations. Royal or Easton cannot be deprived of, or even have, parental rights, nor can either be deprived of life, except in a very technical sense, nor can either be removed from artificial life support. Likewise, Ameritech Illinois cannot be deported or involuntarily committed to a mental hospital⁶. The notion that any entity is subject to such legal jeopardy, or has associated rights, verges upon absurd.

Illinois courts have deemed the “preponderance” standard to adequately protect the rights of parties to administrative proceedings where the property interest at issue is a tenured teaching position, Chicago Bd. of Education v. State Board of Education, 113 Ill. 2d 173; 497 N.E.2d 984; 100 Ill. Dec. 715 (1986), Chicago Bd. of Education v. Payne, 102 Ill. App. 3d 741 (1st Dist. 1981), Adelman, *supra*; a jockey's license; Feliciano, *supra*, or the right to drive a motor vehicle. Sutton, *supra*. Likewise, courts

have deemed the “preponderance” standard to be proper before fire and police merit boards, McCoy v. Board of Fire & Police Commissioners, 54 Ill. App. 3d 276 (1977); Ritenour v. Police Board, 53 Ill. App. 3d 877 (1977), and civil service boards. Drezner v. Civil Service Comm’n, 398 Ill. 219 (1947). All of these property interests are as significant as, if not more significant than, the contractual interest a telecommunications carrier has in an interconnection agreement.

On page 10 of its BOE, Ameritech argues that Section 10-15 of the APA does not apply since another standard is “otherwise provided by law.” AI BOE at 10. Ameritech’s argument can only be accepted if the Commission agrees with Ameritech’s preceding argument -- that Section 252(e) requires “clear and convincing” evidence. AI BOE 7-10. Staff supports the proposed Order’s findings on the standard of proof, as stated above.

For the foregoing reasons the Proposed Order correctly set the standard of proof at “preponderance of the evidence.”

5. Section 10.6 of the SBC11STATE plan Defeats the Purpose of Tier 1 Payments Acting as Liquidated Damages

Ameritech argues that the Proposed Order’s finding, that liquidated damages provision in the SBC11STATE plan does not meet the requirements for such a provision since Section 10.6 acts as a cap, “is unfounded.” AI BOE at 13-14. The Proposed Order’s finding is correct since the SBC11STATE plan has a cap that prevents a CLEC from properly recovering liquidated damages, wherein contrast, the Illinois Remedy Plan

⁶ Were proceedings of this nature contemplated, the Staff agrees that a “clear and convincing”

and *Remedy Plan Order* do not have a cap, and therefore do not prevent Tier 1 from operating as a liquidated damage provision.

The basis of Ameritech's argument is that the cap is moot unless the \$510,000 cap is exceeded. *Id.* at 13. Whether Ameritech exceeds the \$510,000 or not is not the determination to be made. The question at hand is how does this monthly cap compare to the comparable provision in Illinois Remedy Plan. The *Remedy Plan Order* does not set a fixed, or "hard," cap for monthly Tier 1 payments; it is 1/12 of the annual "soft" cap⁷, which is 1/12 of approximately \$317 million. Remedy Plan Order at 41-43. As a "soft" cap, Ameritech would continue to pay beyond the cap, and therefore the Tier 1 payments continue to act as true liquidated damages. This comports with the notion of liquidated damages on a per occurrence basis, since the CLEC suffers the approximate dollar amount of harm per occurrence, or per violation of a PM standard.

Therefore, if Ameritech fails to meet a PM standard a certain number of times the CLEC would approximately suffer \$510,000 in harm, and consequently Ameritech would pay \$510,000 in liquidated damages as compensation for that harm. However, if Ameritech continues to miss the PM standard, then it would owe more than the \$510,000, but it would not have to pay. In effect, the cap in Section 10.6 of the SBC11STATE plan does not allow the Tier 1 payments to act as true liquidated damages, whereas the "soft" cap provided in the Illinois Remedy Plan allows Tier 1 payments to act like liquidated damages. Additionally, a cap would allow Ameritech to keep violating a standard but not have to make payments above the cap, and from the CLEC's perspective it is losing the liquidated damage amount per occurrence that is

standard would be the proper one.

stated in the agreement for every violation in excess of the number needed to reach \$510,000.

A cap harms the CLEC's ability to properly recover liquidated damages. Since the SBC11STATE plan has a cap, it prevents a CLEC from properly recovering liquidated damages, wherein contrast, the *Remedy Plan Order* does not have a cap and therefore does not prevent Tier 1 from operating as a liquidated damage provision. For the foregoing reasons, the liquidated damages provision is not in the public interest.

6. Tier 2 Payments need to Be Clearly Stated in the Remedy Plan in the Interconnection Agreement

Ameritech argues that the Proposed Order's finding regarding tier 2 is clearly erroneous since the *Remedy Plan Order* requires Tier 2 payments be made. The Proposed Order correctly determined that the lack of an express statement of how Tier 2 payments operates under this plan is against the public interest. Proposed Order at 21. In support of the Proposed Order's finding, Staff reiterates the arguments it set forth on pages 33-36 of its Initial Brief.

7. The SBC11STATE plan is not the FCC's Plan

Ameritech argues that the difference between the number of performance measures used in the SBC11STATE plan and the Illinois Remedy Plan is inconsequential. AI BOE at 17-19. Ameritech is mistaken, and Staff supports the Proposed Order's findings.

⁷ A "soft" cap allows the value to be exceeded.

As support for its position, Ameritech incorrectly relates the SBC11STATE plan to the remedy plan approved by the FCC when Ameritech states that the “FCC’s order laid out the 11-State Plan in great detail, and it made that plan a condition of merger approval.” AI BOE at 19. The SBC11STATE plan is not the same as the FCC approved remedy plan, it has different calculation methodologies, although they both have the same PMs. However, FCC approval of PMs is a point of argument without significance when compared to the fact that the Proposed Order rested its decision upon the fact that “the number performance measures in the SBC11STATE plan is significantly fewer than that [sic] the number paid upon by the *Remedy Plan Order*.” Proposed Order at 22.

It matters not that the FCC had approved certain PM’s for its remedy plan in light of the fact that the FCC allows state commissions to approve and establish their own remedy plans, and even condones state commissions to do so. FCC Merger Order, FCC 99-279, CC Docket #98-141, Appendix C, Condition 23 (stating “the Plan does not limit the authority of any state to adopt additional or different state performance monitoring requirements or associated remedies.” Section 252(e)(3) supports this notion, since it allows the commission to protect its intrastate service quality standards. 47 U.S.C. 252(e)(3).

Additionally, the FCC’s Order approving the SBC/Ameritech merger stated that its plan would be in addition to state approved remedy plans (FCC Merger Order, FCC 99-279, CC Docket #98-141, Appendix C, Condition 23), and does not state that it supersedes or preempts those plans. Further, the *Merger Order* acknowledged that the FCC would be instituting a remedy plan, and, in Condition 30, the Commission still

required Ameritech to implement a remedy plan and that it would operate in addition to the FCC's remedy plan. Merger Order §1.2.i at 219. For the foregoing reasons, a finding that limiting the number of PMs to twenty (20) is against the public interest is not saying that "the FCC and other states have made a lot of terrible mistakes" (AI BOE at 19-20). Thus, the Proposed Order's finding is correct.

8. Absence of Provisions in the SBC11STATE plan That Are Clearly Provided for in the Illinois Remedy Plan Are Not in the Public Interest

On pages 20 and 21 of its BOE, Ameritech argues that "there is no basis for the proposed order's conclusion" that the absence of a provision that triggers a regulatory proceeding, and the lack of annual and mini-audit provisions, are against the public interest. AI BOE at 20-21. The Commission correctly decided that 47 U.S.C. 252(e)(3) grants the Commission the right to "compel Ameritech to submit a Remedy Plan consistent with the plan adopted in 01-0120" (Proposed Order at 19), and that the "Illinois Remedy Plan was the minimum standard which all future performance measurements and remedy plans were to meet" (Id.). Since the Illinois Remedy Plan is to act as a minimum, or a floor, then the SBC11STATE plan has to include provisions that are equal to or exceed comparable provisions in the Illinois Remedy Plan. As Staff argued in its initial brief, the absence of similar provisions in the SBC11STATE plan is against the public interest, since the Commission determined that a remedy plan needs to have such provisions to ensure that the wholesale market will be open to competition. Staff IB at 36-40.

9. The Proposed Order's Interpretation of Section 6.1 is Entirely Reasonable

Ameritech argues that the Proposed Order was wrong in finding that Section 6.1 is against the public interest since it is clear on its face. AI BOE at 22. Staff disagrees, this provision is not clear on its face, if it was it would not have been an issue. Staff does not deny that the parties could cure this language, however, as stated, the plain reading of the provision allows Ameritech to avoid payment of remedies on performance measures with a benchmark standard if Ameritech provides service in parity. Staff IB at 41. Most importantly, the Illinois Remedy Plan does not allow such an exception, and since this interpretation could allow Ameritech to avoid payments under the SBC11STATE plan, it therefore is against the public interest.

For the foregoing reasons, the Proposed Order's finding the Section 6.1 is against the public interest is correct.

10. The Commission Properly Assigned a Negative Inference to Ameritech's Refusal to Produce Evidence Regarding Tier 1 Payments

On pages 3 and 4 of its BOE, Ameritech argues that the Proposed Order erroneously faults Ameritech for objecting to Staff Discovery. This statement mischaracterizes the Proposed Order's statement. The trier of fact is free to draw a negative inference based on a parties failure to produce evidence that is within its control. That is clearly the case here, and is reasonable in light of the fact that Ameritech had produced similar information in Docket 01-0120. Staff Motion to Compel ¶10. The Commission is correct in making this presumption since it is well recognized "that where evidence to prove a fact is chiefly, if not entirely, in control of the adverse party and such evidence is not produced, his failure to produce the evidence tends to

strengthen the probative force of the evidence given to establish such claimed fact.” Belding v. Belding, 358 Ill. 261, 221 (1934). Therefore, despite sustaining Ameritech’s objections, the fact that Ameritech had produced such information in one docket, but refused to produce it in this docket is sufficient for the ALJ and Commission to raise a presumption against Ameritech’s interest in evaluating the amounts paid under Tier 1.

11. The Commission Has Already Concluded the Need for an adequate Performance Measurement and Remedy Plan (Ameritech BOE §V.A)

Ameritech has not proved that it is in the public interest, that the public is inconvenienced, or that there is a public need to have the limited 11State performance measurement and remedy plan in Illinois, since the creation of the Illinois Remedy Plan. Ameritech does not even claim that there is a public interest, public need or public convenience in having competing performance measurement and remedy plans, when the Ameritech 11State Plan is one which was bypassed by this Commission in the SBC/Ameritech merger order. Merger Order at 209-232, *see esp.* 215, 224-5, 232. Essentially Ameritech is attempting to refile the *Merger Order* and the *Remedy Plan Order*.

It should be noted that, since the filing of testimony in this case, the situation in Indiana has changed. Indiana has produced a state-remedy plan, which Ameritech-Indiana is challenging in federal court. United States District Court for Southern Indiana, Docket No. 02-1772. It is Staff’s understanding that the case is pending rehearing before the Indiana Utility Regulatory Commission as well. Thus, there is some doubt that Indiana finds the preexisting remedy plan as satisfactory. Of course, as the proposed order finds, adequate service in the other 12 SBC states, California,

Nevada, and the other 10 states on the SBC 11-State Plan, does not prove the lack of need of the Illinois Remedy Plan.

12. Negotiations Go to Both the Facts of Agreement and the Measurement of the Public Interest (Ameritech BOE §V.B)

The evidence in this case shows that Ameritech has been implementing in Illinois anything but what Ameritech was to implement under Condition 30 of the Merger Order, namely, the Texas Remedy Plan and its successor, the Illinois Remedy Plan. Ameritech does not even attempt to justify its imposition of a different remedy plan in Illinois, whenever these small new CLECs seek to obtain interconnection agreements. Ameritech cannot justify what it has been doing. Indeed, allowing the established, bigger CLECs into the better Illinois plans, while pushing the newer, smaller CLECs into a lesser plan, both in terms of performance measurements and penalties, violates the public interest, convenience and necessity under 47 USC 252(e)(2) as undue preferential/discriminatory treatment of CLECs who should be treated identically.

Although Ameritech has claimed that these new CLECs can opt into the Illinois Remedy Plan, Ameritech hopes to delay matters long enough so that the Illinois Remedy Plan disappears. Moreover, there is no justification for making these new carriers jump through any additional hoops. The Commission has announced the performance measurements and remedies upon which all future plans must be based. Remedy Plan Order at 20. How are these additional delays in the public interest?

Ameritech argues that its 13 State/11State Plan is just as good as the performance measurements and remedy plans that were established by Commission order. However, the Commission at the time of the merger order was well aware of the

pending FCC decisions on performance measurements and remedy plans, upon which Ameritech claims the 13State/11State Plan is based. Merger Order at 209-232, see *esp.* 215, 224-25, 232. The Commission ruled in essence that the FCC's plan was irrelevant in Illinois, since everything that the FCC was considering was included in the Texas Remedy Plan. Since the Illinois Remedy Plan contains additions and refinements to the Texas Remedy Plan, everything in the 13State/11State Plan is likewise contained in the Illinois Remedy Plan.

If the Commission was satisfied with the more limited, pending FCC plan, the Commission would not have ordered implementation of the Texas Remedy Plan. Ameritech's argument that its 13State/11State Plan is just as good as the Illinois Remedy Plan is an improper collateral attack on the merger order. 220 ILCS 5/ 10-201(f). The Commission in fact has already ruled in the Merger Order that 13State/11State Plan is not in the public interest in Illinois.

There is no doubt that, if new and small CLECs were to search each of the 13-state SBC service territory, a great amount of additional information concerning negotiated agreements, rates, wholesale service performance, tariffs, etc. could be found. Yet all of these small and new CLECs sign a basic, 13-State agreement with SBC as is shown by the General Terms and Conditions-SBC-13State, the main body of the negotiated agreement with Cordia. That SBC wishes to standardize its negotiated agreements throughout its 13-state territory is understandable. This does not justify its omission of information for Illinois.

When Ameritech argues that, when Ameritech provides partial or erroneous information to such CLECs through its website, such issues are of no matter to the

resulting negotiated agreement is preposterous.⁸ (Incidentally, as far as the website is concerned, the evidence is that the Illinois Remedy Plan was not listed.) For example, had any of the CLECs agreed that they were waiving the equivalent rights, which are preserved for Ameritech in Section 21.1 of the General Terms and Conditions, that “negotiating” fact {as Ameritech would have it} would change the waiver issue entirely. There is a difference between an item actually negotiated between Ameritech and a CLEC and the signing off of boilerplate provided by the dominant party, when the contract is to be measured for public convenience, necessity and interest.

Ameritech does not even deign to explain why the state performance measurement and remedy plans of California and Nevada are favored, the Wisconsin plan disfavored, and this State is ignored as nonexistent. The CLECs have no real interest in any of this; they just want to be treated like the pre-existing CLECs. Only Ameritech has an interest in delaying or defeating the adoption of the Illinois Remedy Plan. The Proposed Order correctly sets forth the three items as deficiencies to this agreement or a response to an Ameritech argument.

13. The Proposed Rejection of This Agreement Cannot Be Held to be Unlawful under 47 USC 252 (e) (3) (Ameritech BOE §V.C.)

Ameritech argues that 47 U.S.C. §252(e)(3) does not mean what it says. The provision states that a state Commission can establish other requirements of state law in its review of a negotiated agreement, including compliance with intrastate service quality standards or requirements. It is patently false to argue that the Commission

⁸ In Staff's view, the offering of the 11State/13State Plan, after the Order in 01-0120 is erroneous.

cannot impose service quality standards in this case, given its express reservation in federal law. Further, there is no showing by Ameritech that the imposition of the performance measures and remedies contained in the Illinois Remedy Plan conflicts with federal law. After the years of unsatisfactory wholesale service performance by Ameritech in Illinois, the public interest is not served by the proposed limited performance measurements and inadequate enforcing remedies.

14. The Finding Concerning the Prior Dockets Should Remain (Ameritech BOE § V.D.)

Ameritech claims that the extensive administrative notice of other Commission dockets which it made was pointless. However, the proposed order correctly notes what is important—that all the *sub rosa* approval of the 13/11 State Plan in prior negotiated agreements does not bar the Commission from considering the issue for the first time herein. The finding should be kept to foreclose the possibility that Ameritech on appeal will argue that all of these noticed decisions bars the Commission from deciding this case.

15. The Public Is Not Convenienced by Silence on the CLEC Waiver Issue (Ameritech BOE § V.E.)

As shown by the existing agreement between Ameritech and Budget Phone Inc. in #01-0800, which was administratively noticed in this case as Ameritech Cross Ex. 2, the Section 21.1 of the General Terms and Conditions which Ameritech/SBC presents

Illinois should have been listed separately as is California and Nevada.

to CLECs as part of its basic Negotiated Agreement contained the following last sentence as late as November 2001:

The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies, or arguments with respect to such decisions or proceedings or any remands thereof, including its right to seek legal review or a stay pending appeal of such decisions and its rights under this Intervening Law paragraph.

Ameritech has deleted this last sentence from its boilerplate. The question presented is: is the change intended to support a claim by Ameritech that CLECs entering into the current form of its basic Negotiated Agreement were waiving their legal rights under the Intervening Law provision, Section 21.1? In other words, was the deletion intended to be meaningful or meaningless? Since the benefit of a meaningful deletion would run to Ameritech's benefit, Ameritech is the party who should know. Yet Ameritech still refuses to admit, in fact, that there is no waiver of legal rights by the CLECs under the current form of its Section 21.1 of the General Terms and Conditions.

Ameritech is willing to argue that, in Docket 02-0650, Cordia Communications did not waive, in Docket 02-0596, Budget Phone did not waive, in Docket 02-0651, Royal Phone did not waive, and in Docket 02-0654, Easton Telecom Services did not waive. Staff believes that the result will be the same in all the other pending dockets wherein the current form of Section 21.1 of the General Terms and Conditions can be found: 02-0676, 02-0695, 02-0775, 02-0782, and 02-0789. In no case examined by Staff, has the CLEC involved negotiated to waive its intervening law rights (Mr. Gironda of Cordia, Tr. pp. 189-190). Indeed, Ameritech's conceit that Cordia has no interest in preserving its

intervening law rights is contrary to the afore-cited evidence.⁹ Cordia's interest in preserving its rights may not be as great as Ameritech, but the interest does exist.

Although there is universal agreement that Cordia did not waive its intervening law rights by signing on to the existing Section 21.1 of the General Terms and Conditions, Ameritech still fights the memorialization of the construction of Section 21.1. There can be only one reason for this, namely, that Ameritech intends to leave its options open to make such an argument in the future. Probably not against Cordia or the other eight CLECs (so far), but against earlier and later CLECs that are subject to this form of Section 21.1. Yet, if Section 21.1 does not constitute a waiver of intervening law rights by Cordia, Budget, Royal or Easton, it is also not a waiver by any CLEC signing on this form of Section 21.1.

The public is not inconvenienced by requiring this issue to be raised every time Ameritech's basic Negotiated Agreement containing the current form of Section 21.1 is filed for approval. 47 U.S.C. §252(e)(2)(A)(ii). This waiver issue continues even after all the remedy plan issues are finally settled and forgotten. Ameritech's intransigence from admitting anything in relation to its boilerplate language created this issue, *i.e.*, Ameritech could easily have stated that, in fact, its change to Section 21.1 was meaningless. However, the public, the CLECs and this Commission should not be put in the position of continuously chasing Ameritech to see if it has decided to change its

⁹ Ameritech knows that the preservation of rights vis-à-vis changing law is a concern of CLECs. In pending Docket 02-0704, a five-paragraph third amendment to a negotiated agreement between Ameritech and Focal can be found. The longest paragraph (#3) in this amendment contains such a preservation of rights for both parties. Such reservations are not uncommon, e.g. 02-0694, Sec. VII, p.22 of the Amendment..

position on waiver in relation to Section 21.1 of its General Terms and Conditions, whenever a basic Negotiated Agreement comes to this Commission for approval.

Under the evidence of this case, where the only evidence is that the CLEC did not waive its rights vis-à-vis Intervening Law changes, Staff would oppose as against the public interest Section 21.1 of the General Terms and Conditions if Ameritech had claimed that the CLEC had waived said rights. Ameritech is in no way harmed by the proposed finding. If in the future Ameritech will claim that a CLEC has waived its

Intervening Law rights, whether upon approval of a negotiated agreement or upon a complaint, Ameritech is going to need something more than Section 21.1 of the General Terms and Conditions to justify such a claim.

Wherefore the Staff of the Illinois Commerce Commission ask that the exceptions of Ameritech to the proposed order in the above docket be rejected.

Respectfully submitted,

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ATTACHMENT A

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, FCC 99-404 CC Docket 99-295 (rel. Dec. 22, 1999) (*New York 271 Order*), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, FCC 00-238, CC Docket 00-65 (rel. June 30, 2000) (*Texas 271 Order*);

Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, FCC 01-29, CC Docket 00-217 (rel. Jan. 22, 2001) (*Kansas/Oklahoma 271 Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, No. 01-1076 (D.C. Cir. Dec. 28, 2001);

Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, FCC 01-0130 CC, Docket 01-9 (rel. April 16, 2001) (*Mass 271 Order*)

Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, FCC 01-208, CC Docket 01-100 (re. July 20, 2001) (*CT 271 Order*)

Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania, FCC 01-269, CC Docket 01-138 (rel. Sept. 19, 2001) (*Pennsylvania 271 Order*);

In the matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri, FCC 01-338, CC Docket 01-194 (rel. Nov. 16, 2001) (*Arkansas/Missouri 271 Order*).